

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

ROQUE A. ACOSTA,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 01-1489
)	
ANTHONY PRINCIPI,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

REPLY BRIEF OF THE APPELLANT

Pursuant to U.S. Court of Appeals for Veterans Claims Rule 28(c), Roque A. Acosta (“the appellant” or “the veteran”) provides the following reply to the Secretary’s Brief.

INTRODUCTION

This appeal involves two issues: entitlement to an earlier effective date for the grant of service connection for chronic paranoid schizophrenia, and entitlement to a schedular rating, in excess of 70 percent for that disability. In his Brief, filed on April 1, 2002, the appellant argued that the Board of Veterans’ Appeals (“BVA” or “Board”) had provided inadequate reasons or bases, on the earlier effective date issue, by failing to address whether the veteran had timely perfected an appeal to a 1983 rating decision that denied his claim for entitlement to service connection for schizophrenia. (Appellant’s Brief at p. 4-8). The appellant set forth further

that VA had failed to provide the appellant with a Statement of the Case regarding his appeal of the assigned 70-percent schedular rating for schizophrenia. (Appellant's Brief at p. 9).

The Secretary filed his Brief on August 29, 2002. In his Brief, the Secretary argues that the BVA decision should be affirmed. For the reasons set forth more fully below, the Secretary's arguments are unavailing, and the appellant asks that this Court vacate and remand the June 5, 2001, BVA decision.

RESPONSE TO THE SECRETARY'S ARGUMENT

I. The BVA provided inadequate reasons or bases on the issue of entitlement to an earlier effective date.

In his Brief, the appellant noted that he would potentially be entitled to a much earlier effective for service connection for schizophrenia if the grant stemmed from his September 1982 claim, rather than from the 1995 claim. The grant would be based upon the September 1982 claim if that decision had never become final. (Appellant's Brief at p. 4-5). In this respect, the appellant noted that he had initiated an appeal of the last prior denial of his claim in March 1983 by filing a Notice of Disagreement, and that had timely requested an extension of time for filing his Substantive Appeal. (Id.). By not addressing whether the March 1983 decision was final in light of the above and 38 C.F.R. § 19.130, the appellant asserted that the BVA had provided inadequate reasons or bases.

In response, the Secretary contends that the Board was under no obligation to address the finality of the March 1983 decision, because that issue had been decided in a 1998 BVA decision. Because the veteran did not appeal the 1998 decision, the Secretary asserts that the veteran's only recourse was to assert that the 1998 decision contains clear and unmistakable error (CUE). (Secretary's Brief at p. 11-15).

The Secretary sets forth that the 1998 BVA decision "adjudicate[d] the issue" of "whether a timely appeal had been submitted to the March 1983 decision." (Secretary's Brief at p. 11). Thus, the Secretary contends, the Board correctly determined "that the issue of a timely appeal to the March 1983 decision was not before it." (Secretary's Brief at p. 12).

Contrary to the Secretary's argument, the Board did not "adjudicate" the issue of whether the 1983 RO decision was timely appealed. This is so because the BVA did not have jurisdiction to address that issue, and is also evident from the 1998 BVA decision itself.

a. The BVA did not have jurisdiction to address the issue of whether the March 1983 decision was timely appealed.

The Board has jurisdiction to consider decisions of the RO which have been properly appealed. 38 U.S.C. §§ 7104, 7105; 38 C.F.R. §§ 20.101, 20.200. In order to vest jurisdiction in the Board to adjudicate a particular issue, the claimant must first file a Notice of Disagreement ("NOD") "with an adjudicative determination by the agency of original

jurisdiction.” 38 C.F.R. § 20.201. Following the NOD, the RO must issue a Statement of the Case, and the veteran must perfect his appeal with a Substantive Appeal. 38 C.F.R. § 20.200.

VA regulations provide specifically that the question of whether an RO decision was timely appealed is an appealable issue in and of itself. 38 C.F.R. § 19.34. As such, it follows that for the BVA to have jurisdiction over that “issue” it would have to be the subject of an RO decision, and be timely appealed to the Board. In this case however, there has never been a rating action by the RO on the issue of whether the veteran timely perfected an appeal of the 1983 decision. Because there was no adjudicative action by the RO on the timeliness issue, there was no opportunity for the veteran to submit an NOD, there was no Statement of the Case was issued, and no Substantive Appeal filed. Based upon the above, the Board did not have jurisdiction to adjudicate the issue of whether the 1983 RO decision was timely appealed, and the Secretary’s assertion that the Board “adjudicated” that issue is erroneous.

b. The 1998 BVA decision did not adjudicate the issue of whether the March 1983 decision was timely appealed.

A review of the 1998 BVA decision itself confirms that no decision was made on the issue of timeliness of the appeal. VA regulations specify “[t]he decision of the Board will be in writing and will set forth specifically the issue or issues under appellate consideration.” 38 C.F.R. § 19.7(b);

see 38 U.S.C. § 7104(d). In the January 1998 decision, the only matter listed under the heading “THE ISSUE” was whether new and material evidence had been submitted. (R. at 333). It follows that the only issue being addressed in the 1998 BVA decision was whether new and material evidence had been received, not the separately appealable issue of whether the 1983 RO decision was timely appealed. Furthermore, under the heading “DECISION OF THE BOARD.” (R. at 334) the only matter discussed was that new and material evidence had been received. No mention of the timeliness issue is found in the “FINDINGS OF FACT” or “CONCLUSION OF LAW” sections either. (R. at 335). In fact, the only discussion regarding an appeal of the 1983 decision is found in the “REASONS AND BASES FOR FINDINGS AND CONCLUSION” section, wherein the Board stated “The veteran was notified of the [1983] decision and he did not file a timely appeal. As a result, the March 1983 decision subsequently became final one year later.” (R. at 335).

It follows from the above that the only “issue” adjudicated in the 1998 BVA decision was whether new and material evidence had been received. This is particularly true in light of the fact that VA regulations, as set forth above, provide expressly that the issue of whether an RO decision is timely appealed must be appealed separately. 38 C.F.R. § 19.34.

To conclude otherwise would mean that every statement in every favorable BVA decision would become finally binding on a claimant were he not to appeal the decision to this Court, even if the benefit sought by the appellant had been granted by the BVA. This would require a claimant to carefully examine every BVA decision that granted the issue on appeal, for fear that an offhand remark, typographical error, or other erroneous statement might come back to haunt him in the context of some yet unimagined or unrelated future claim. Finding any mistake would then compel the claimant to appeal to this Court, lest the error later harm him. If the Secretary's position is adopted, not only will additional burdens on this Court accrue, but asking a claimant, who is not represented by an attorney, to seek out and conceive of potential future harm in the nooks and crannies of a favorable BVA decision flies in the face of the non-adversarial nature of the claims process at VA, including the BVA.

c. There was no “final decision” that the veteran could have appealed to this Court.

The Secretary contends that the appellant's opportunity for this Court's review came at the time of the 1998 BVA decision. He also asserts that the BVA must have decided the timeliness issue because “otherwise the reopening of Appellant's claim is meaningless and would be contrary to statutory framework relating to reopened claims.” (Secretary's Brief at p. 12).

The appellant responds by noting first that this Court's jurisdiction is limited to reviewing "decisions of the Board of Veterans' Appeals." 38 U.S.C. § 7252. Only "final decisions" of the BVA may be appealed to this Court. 38 U.S.C. § 7266(a). Insofar as the BVA did not have jurisdiction to address the timeliness issue, and because it did not, in fact, make a decision on that issue, there was no "final decision" for the veteran to appeal in 1998.

Moreover, because the only decision made, that the veteran's claim should be reopened, was *favorable* to the veteran, there was nothing for this Court to review. See *MacWhorter v. Derwinski*, 3 Vet. App. 223 (1992) (dismissing appeal when the benefit sought had been granted). Further, even if it was improper for the BVA to have reopened the claim when there was no final prior decision, because the error was in the veteran's favor, it was harmless and not reviewable by this Court. See *Bagwell v. Brown*, 9 Vet. App. 337, 339-340 (1996); *Floyd v. Brown*, 9 Vet. App. 88, 95 (1996). As such, the Secretary's argument must fail.

II. VA failed to provide the veteran with a Statement of the Case on the issue of entitlement to an increased schedular rating for schizophrenia.

In his Brief, the appellant demonstrated that in February 1999 (R. at 571) the veteran filed a NOD on the issue of the initial schedular rating assigned for his service-connected schizophrenia. (Appellant's Brief at p. 9). He argued that remand was required, so that a Statement of the Case

could be issued, as required under *Holland v. Gober*, 10 Vet. App. 433, 436 (1997) (per curiam order).

The Secretary responds first by addressing the appellant's November 1998 NOD, stating that it was limited to the question of the proper effective date, without disagreeing with the assigned rating. (Secretary's Brief at p. 15-16). While the November 1998 NOD does not contest the assigned schedular rating, the February 1999 NOD most certainly does. Thus, the Secretary's argument must fail.

The Secretary asks that this Court view the February 1999 NOD "within the context of the factual record." (Secretary's Brief at p. 17). Under the Secretary's reading, the February 1999 NOD was made in the context of the veteran's claim that he was unable to work. (Id.). This Court addresses whether a particular document is an NOD on a *de novo* under 38 U.S.C. § 7261 (a). *Buckley v. West*, 12 Vet. App. 76, 82 (1998) (quoting *Beyrle v. Brown*, 9 Vet. App. 24, 27-28 (1996)). In this regard, the appellant notes that in the February 1999 statement, he wrote, "I disagree with your decision of 10/19/98 granting 70% service connection for my schizophrenia." (R. at 571). The veteran went on to state that not only did his service-connected disability prevent him from working but that he was "unable to function socially," and that "my social adaptability is nil." (Id.). Based upon the above, it is clear that the veteran was disagreeing with the assigned rating, and that his disagreement extended beyond a claim that

he was unable to work. Of particular relevance is the fact that the veteran's complaints in the statement reference not only occupational impairment, but total social impairment. Pursuant to *The Schedule for Rating Disabilities*, a 100-percent schedular rating is assigned for "total occupational and social impairment." 38 C.F.R. § 4.130. On the other hand, a total disability rating for individual unemployability is based solely on occupational impairment. 38 C.F.R. § 4.16. On this basis, the veteran asks that this Court find that his NOD specifically addressed the schedular rating assigned for schizophrenia.

The Secretary's next argument, which he contends is his "most compelling," is that the RO issued a rating decision in May 2000 denying entitlement to a 100-percent schedular rating, and that the veteran did not submit a NOD with that decision. (Secretary's Brief at p. 16). Thus, he believes this Court lacks jurisdiction. However, a veteran need submit only one NOD on a particular issue to vest jurisdiction in this Court. See *Barrera v. Gober*, 122 F.3d 1030 (Fed. Cir. 1997) ("The NOD which must serve to confer jurisdiction on the Court of Veterans Appeals is the first one filed with respect to a given issue"). Because the veteran filed a NOD in February 1999, he had no obligation to file another one, and this Court does have jurisdiction.

The Secretary's final argument is that because the veteran has been granted a total disability due to individual unemployability ("TDIU"),

effective the date of entitlement to service connection, that there is no remaining case or controversy, and any appeal would be moot.

(Secretary's Brief at p. 17-18). He asserts that although the basis for a grant of TDIU differs from that for a schedular rating, that even if the TDIU benefit were to be removed at some future date, that any impact on the veteran would be theoretical, precluding review by this Court. (Id.).

In response, the appellant notes that additional benefits flow from a 100-percent schedular rating that are not available to a veteran rated as TDIU. For example, special monthly compensation due to being permanently housebound is payable to a veteran under 38 C.F.R. § 3.350(i)(2) if he has "a single service-connected disability rated as 100 percent," but not if he has TDIU. As such, the appellant asserts there is a qualitative difference in being awarded a 100-percent schedular rating, and being awarded TDIU such that a case or controversy remains, and this matter should be remanded to the BVA with instructions that the veteran be provided a Statement of the Case.

CONCLUSION

WHEREFORE, the Court should vacate and remand the June 5,

2001, BVA decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2002, a true copy of the attached Reply Brief was mailed, postage prepaid, upon General Counsel (027) Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420. I certify under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Daniel G. Krasnegor